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## MUMPOWER et al. v. CASTLE et al.

Sept. 16, 1920.

[104 S. E. 706.]

**1. Deeds (§ 208 (7)\*)—Evidence Held to Show That Deed Was Not to Be Delivered During Life of Grantor.**—In an action for partition of land, evidence held to show that it was not the intention of the grantor that a deed found among his papers should be delivered and become operative as a conveyance in his lifetime.

[Ed. Note.—For other cases, see 4 Va.-W. Va. Enc. Dig. 406, et seq.]

**2. Deeds (§ 56 (6)\*)—No Delivery by Dead Hand.**—There can be no delivery of a deed by a dead hand, since a deed as such must operate, if at all, inter vivos.

[Ed. Note.—For other cases, see 4 Va.-W. Va. Enc. Dig. 406, et seq.]

**3. Wills (§ 88 (2)\*)—When Deed May Operate as a Will.**—If executed in accordance with the statute of wills, a deed may operate as a will if it be intended by the party making it to take effect only after his death, but one cannot dispose of property by deed, executed according to the forms of law, but which he retains in his possession and control, intending that it shall not operate until his death, or that it shall be delivered at his death.

[Ed. Note.—For other cases, see 13 Va.-W. Va. Enc. Dig. 707, et seq.]

**4. Deeds (§ 56 (4)\*)—Grantor May Deliver and Yet Retain Manual Possession.**—The mere fact that a grantor retained a deed in his manual possession, and that the grantee was not present, and did not even know of the existence of the deed at the time, did not prevent the delivery of the deed, where there were acts of the grantor which evidence that the instrument was completed so far as he was concerned, that he intended it to operate presently, and the deed was beneficial to and was afterwards accepted by the grantee, although it never came into the manual possession of the latter, and the acts of the grantor which evidence completion of instrument may consist in part of declarations.

[Ed. Note.—For other cases, see 4 Va.-W. Va. Enc. Dig. 403, et seq.]

**5. Deeds (§ 208 (1)\*)—Acknowledgment Alone Not Prima Facie Evidence of Delivery.**—An acknowledgment of a deed for record by the grantor alone is not prima facie evidence of delivery, where grantor

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\*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.

retained possession until his death without any declaration or other evidence of his intention as to delivery.

[Ed. Note.—For other cases, see, 4 Va.-W. Va. Enc. Dig. 406, et seq.]

**6. Deeds (§ 194 (1\*))—Presumption of Delivery of Deed Evidencing Voluntary Settlement May Be Rebutted.**—The presumption of delivery of a deed evidencing a voluntary settlement is but a prima facie presumption, since delivery of a deed of voluntary settlement is as essential to its validity as is the delivery of any other deed, and the acts of a grantor which are essential to a delivery must be performed in his lifetime.

[Ed. Note.—For other cases, see 4 Va.-W. Va. Enc. Dig. 406, et seq.]

**7. Frauds, Statute of (§ 117\*)—Undelivered Deeds Considered as Contracts to Convey Only Where There Is Evidence Showing Meeting of Minds.**—The effect of a contract to convey is given to an undelivered deed only where there is some evidence aliunde that there was a meeting of the minds of the grantor and grantee in a completed contract, the terms of which are expressed in the deed.

[Ed. Note.—For other cases, see 6 Va.-W. Va. Enc. Dig. 538.]

**8. Trusts (§ 21 (1\*))—Undelivered Deed Not a Constructive Contract to Convey Involving Implied Trust.**—An undelivered deed cannot be supported as a contract to convey by an implied or constructive contract involving an implied or constructive trust, where the terms of the contract expressed in the deed are very different from the contract or trust which the law implies or raises in such a case.

[Ed. Note.— For other cases, see 13 Va.-W. Va. Enc. Dig. 297, et seq.]

**9. Trusts (§ 81 (1\*))—Trust Arises in Favor of Wife and Children Furnishing Money to Purchase Land in Name of Husband and Step-father.**—Where property of wife and children by prior marriage was given as purchase price for land, the relationship of the wife and children and the grantee not being such that there was any legal or moral obligation on the wife or children to make a gift or advancement to the grantee husband, and no evidence tending to show that there was in fact any gift to him, a trust arose by operation of law in favor of the wife and children from the mere fact of the use of their property.

[Ed. Note.— For other cases, see 13 Va.-W. Va. Enc. Dig. 283, et seq.]

**10. Trusts (§ 72, 95\*) “Implied Trust” and “Constructive Trust” as to Land Purchased Distinguished.**—An “implied trust” arises in land conveyed to one, while the purchase price was paid by another,

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\*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.

if there was no prior agreement between the parties that the title to the land was to be taken in the name of the person furnishing the money, and a "constructive trust" arises if there was such an agreement, making the taking of the title in the grantee's name tortious.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Constructive Trust; Implied Trust. For other cases, see 13 Va.-W. Va. Enc. Dig. 276.]

**11. Trusts (§ 79\*)—Trust Results in Favor of One Paying Part of Price of Land.**—Where two or more persons together advance the price of land, and the title is taken in the name of one of them, a trust will result in favor of the others in respect to an undivided share of the property proportioned to his share of the price; the doctrine in all its phases applying alike to personal and to real property.

[Ed. Note.— For other cases, see 13 Va.-W. Va. Enc. Dig. 276.]

Appeal from Circuit Court, Washington County.

Suit in equity by the children of William A. Castle against the children of Robert Mumpower. Judgment for plaintiffs, and defendants appeal. Reversed and remanded.

*Jno. J. Stuart*, of Abingdon, and *S. B. Campbell*, of Wytheville, for appellants.

*Hutton & Hutton* and *L. P. Summers*, all of Abingdon, for appellees.

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PAYNE et al. v. PAYNE et al.

Sept. 16, 1920.

[104 S. E. 712.]

**1. Descent and Distribution (§ 109\*)—Hotchpot Applies to Partial Intestacy.**—At the common law the doctrine of hotchpot only applied when the decedent died wholly intestate, while under Code 1919, § 5278, it is only necessary that there be a partial intestacy.

[Ed. Note.—For other cases, see 1 Va.-W. Va. Enc. Dig. 192.]

**2. Descent and Distribution (§ 109\*)—Intent of Statute Relating to Hotchpot Stated; "Advancement."**—The intent of Code 1919, § 5278, is to bring about, as nearly as may be, an equal division of the estate of a decedent among his children or other defendants, except so far as he may have himself distributed his estate unequally, and the doctrine does not apply unless the property has been received from the ancestor, either in his lifetime or by his will, and by way of advancement, which is defined as a gift from

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\*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.